No. 85-925

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

THEODORE D. CHRISTENSEN,

Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does a white male prove age and reverse race discrimination by a mere showing that he was fired from his job and replaced by a young black male?

2. Should courts and juries review the wisdom of every job transfer to determine if it was warranted by the circumstances, or will an employer be given the freedom to transfer employees so long as the decision is free from a prohibited discriminatory motive?

TABLE OF SUBSIDIARIES AND AFFILIATES

Non Wholly-Owned Subsidiaries

Equitable Casualty Insurance Company
Tishman Speyer Mart Limited Partnership
Tishman Speyer Florida Properties, Ltd.
Tishman Speyer-Equitable South Florida Venture
Stelas North Carolina Limited Partnership
Tishman Speyer Properties
The Continental Companies
The Continental Companies II
Luxury Hotels Associates
Kravco Company

Equitable's General Account Joint Ventures

First American National Building Partnership
180 East Broad Partnership
First Interstate Tower
One Market Plaza Joint Venture
Palm Desert Joint Venture
Harbert-Equitable Joint Venture
Universal-Equitable Joint Venture
Square 106 Associates
Logan Hilton Joint Venture
Southwest Associates One
Southwest Associates Two
Southwest Associates Three
Midwest Associates Two
West Associates Two
Montgomeryville Associates
Nine Greenway Venture
26th & M Street Associates
Banmak Associates

Equitable-Wright Portland Co. Orbanco Building
Crossroads Plaza Associates
Commercial Tower Associates
Greenway Plaza Ltd. First Hotels Joint Venture
H—Castleton
The Equitable Montgomery Co.
The Equitable Broadway Co.
Quayside Associates Ltd.
Rancho Mirage Joint Venture
The Park Central Joint Venture
The Trump-Equitable Fifth Avenue Company
Cindermak Associates
1819 H Street Joint Venture
Gateway IV Joint Venture
Park Central Hotel Company
Equitable-Birmingham J.V.
Huntmak Associates
Metropolitan Square Assocs.
Westminster City Center Properties of New Orleans Inc.
Lenho Joint Venture
The Equitable-Nissei Madison Company Joint Venture
Cenor Joint Venture
333 Wacker Drive Venture
Westminster City Center Properties of New Orleans Inc.
201 Spear Street Associates Joint Venture
King of Prussia Associates
110 William Street Co.
The Equitable Royal London Camelback Company
Tishman Camelback Venture
Gravier Properties
Royal Biscayne Venture
E/M Boston Associates
D/E Hawaii Joint Venture
Market Street Associates of St. Louis
Centerre-Equitable

Equi-Tech Hotel Joint Venture
Orlando Airport - JP Hotels
Washington International Associates
Plaza of the Americas East Tower Company
Green Acres Associates
Chicago Dock/Equitable Joint Venture
E/R Associates Joint Venture
Third Nat'l. Bank Tower Assoc.
Capital Plaza Joint Venture
Thace Associates
Westminster City Center Properties of New Orleans Inc. #3
Capitol 50 Associates
Equitable-Third Merritt Seven Joint Venture
Airport Technology Park Assoc.
93rd Street Associates
Lincoln-Equitable Old Orchard Venture
The Embassy Joint Venture
Park Central I & II Company
St. Davids Center Associates
The Equitable North Sixty Associates
Penn Eight Associates
Research Property Associates
Astor Plaza Venture Partnership
Tishman Speyer-Equitable Astor Property Partnership
Equitable-Nissei Figueroa Co.
Santel Joint Venture
Lincoln Equitable Oakbrook
Terrace Venture
Willow Grove Associates
Montague Park Associates
Equitable-Meiji Lafayette Assocs.
Square 50 North Joint Venture
Grand Bay Plaza Joint Venture
The Hulen Towers Company Joint Venture
100 Federal Street Ltd. Partnership

Equitable/PCDC Associates, Ltd. III Joint Venture
Natrona Hotel Venture
One Concord Centre Partners
Two Concord Centre Partners
133 E. 54th Street Associates
405 E. 63rd Street Associates
261-220 E. 67th Street Assocs.
233 E. 69th Street Associates
233 E. 70th Street Associates
301 E. 69th Street Associates
305 E. 72nd Street Associates
205 E. 78th Street Associates
Silver Tower Associates
Great Neck Terrace Associates
Interstate Confederation Assocs.
165 West End Avenue Associates
205 West End Avenue Associates
185 West End Avenue Associates
180 West End Avenue Associates
150 West End Avenue Associates
140 West End Avenue Associates
160 West End Avenue Associates
170 West End Avenue Associates
200 West End Avenue Associates
99 State Street Ltd. Partnership
Westmoreland Mall Associates
Brandywine Mall Joint Venture
33 Fifth Avenue Associates
Church Madison Company L. P.
Granite Run Associates
Berkshire Mall Associates
Equitable-Nissei Dallas Co. Joint Venture

Separate Account 8—Joint Ventures

Blue Jeans Equities West
Red Bird Mall Joint Venture
Six Penn Center Associates
Sheraton Harbor Island Hotel
Sheraton Airport Inn
Hammond Square
Swatara Associates
Carr King Street Associates
St. Regis Hotel Joint Venture
Royal Palace Hotel Associates Buena Vista Drive
The Orchards Mall Regional Shopping Center
Quail Springs Mall
Spring Meadows Mall
Mandalay Dallas Joint Venture
Columbia Centre Associates
Dallas Airport Hotel Joint Venture
Williams Square Joint Venture
One Post Office Square Assocs.
Grand Bay Hotel Joint Venture
Equitable/Jackson Shaw Dallas Joint Venture
Tuscany Associates (Land)
Lakeside Commons Joint Venture
Rowes Wharf Associates
The Equitable-Crow Braker Centre Joint Venture of Austin, Texas

Separate Account 9—Joint Ventures

Triple "G" Grove Ltd.
Equi-Tech Hotel
"Ortel" (A Joint Venture)
The Equitable North Sixty Associates
Baywood Center Joint Venture
Research Property Associates

Equitable-Nissei Figueroa Co.
Willow Grove Associates
Montague Park Associates
Equitable-Meiji Lafayette Associates

Separate Account 16A—Joint Ventures

Plaza of the Americas East Tower Company
Westminster City Ctr. Prop. of New Orleans, Inc. #3
Capitol 50 Associates

Calpers Advisory Account #248—Joint Ventures

Pacific Northwest Group A
Pacific Northwest Group B
Pacific Northwest Group B1

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29 U.S.C. § 623(a) 1, 2

29 U.S.C. § 623(f) 2

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BRIEF IN OPPOSITION

FEDERAL STATUTES INVOLVED

Petitioner's statement of the statutes is correct. However, we cite in greater detail 29 U.S.C. §623.

29 U.S.C. §623(a) reads as follows:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age; . . . .

29 U.S.C. §623(f) reads as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under sections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age; . . . .
>
> (3) to discharge or otherwise discipline an individual for good cause.

STATEMENT OF THE CASE

Petitioner began his employment with The Equitable Life Assurance Society of the United States (hereinafter "Equitable" or "Respondent") in 1955, and after several transfers ended up in Indianapolis, Indiana as Division Manager of its real estate office. His superior, Vice President Robert Kist told him in June, 1980 that he was being transferred to Chicago, as Associate Division Manager, and that his salary and grade would remain the same. Christensen knew if he did not accept the transfer, Equitable would terminate him as an employee as he was being replaced in Indianapolis. He opted to refuse a transfer to Chicago. Equitable terminated his employment. At trial he acknowledged

that employee transfers are common at Equitable and, indeed, often involve economic differentials.

Equitable replaced petitioner with a black male under age 40 who it felt would perform better.

Petitioner claimed discrimination on account of age and race because of the age and race of his replacement. In support, he stated that there was no job posting for his position and he knew of two other employees who were offered transfers during their careers, who refused them, but were not fired. He acknowledged that in these two instances the employees were not replaced.

Robert Kist, on behalf of Equitable, testified that he removed Christensen from the Indianapolis position because he was a weak Division Manager who had difficulties in negotiations and who was not very skilled in client relations. A 1978 letter by Kist to the Equitable's Home Office identified these concerns. Kist's superiors and other officers in Equitable's Home Office, from time to time, questioned Kist as to the wisdom of keeping Christensen as Division Manager.

Between 1975 and 1980, Christensen received lower percentage increases than his peers, and in one year he was in the bottom ten percent of employees who were denied an increase.

ARGUMENT IN OPPOSITION TO GRANTING THE PETITION

Summary

When Equitable introduced into evidence a legitimate non-discriminatory reason for the transfer and ultimate termination of employment of Christensen, the presumption of discrimination disappeared from the case. At that point, Christensen had to prove

that Equitable intentionally discriminated against him on account of age and race. The Seventh Circuit reviewed the record in light of this Court's holdings and found that the record did not support the jury finding of discrimination.

A uniform standard of review of motions for Judgment n.o.v. made in the trial courts does exist among the Circuits. There is no conflict among the Circuits. The Seventh Circuit properly reviewed the decision in the trial court and reversed because the evidence in the trial court did not support the verdict. Other Circuits would have similarly reversed the verdict.

Plaintiff has not proved that the affirmative action program in place at the time of his transfer and termination was the motivating force behind Equitable's action to transfer him and ultimately terminate his employment. Therefore, the evidence of the existence of an affirmative action program does not prove that Christensen was discriminated against because he was white.

I.

The court below followed the holdings of this Court.

Petitioner's argument that the Seventh Circuit did not follow the holdings of this Court is incorrect. The court below noted that a legitimate non-discriminatory reason for the employment action taken was articulated. At that particular point, according to *U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983), the presumption in favor of discrimination disappeared from our case and the ultimate issue which the court had to address was whether Equitable intentionally discriminated against Christensen. This is exactly what the Seventh Circuit addressed, consistent with the holdings of this Court.

The ultimate issue in our case is whether Equitable decided to transfer Christensen and to discharge him for refusing the transfer, because he was white and over 40 for the sole purpose of replacing him with a black male under 40.[1] This is Petitioner's burden in this case. His preoccupation with the necessity for rebuttal testimony misconceives his burden. It should make no difference how, or in what order, the case was tried. A plaintiff in an employment discrimination case is required to show that the employment action taken was taken with a discriminatory motive. The focus should be on the substance in — not the form of the trial.

Christensen failed to prove that Kist's reasons for transfer and discharge were not the true reasons — he failed to prove pretext.

As the court below noted:

> The only evidence of discriminatory intent which Christensen was able to offer was the fact that Equitable has an affirmative action program which seeks to recruit black employees for executive positions. . . .
>
> * * *
>
> Nor is there probative evidence that Equitable intentionally discriminated against Christensen because of his age. . . . The most that Christensen was able to show in rebuttal was that his early disassociation from the company had a negative

1. Presumably, if Christensen's replacement had been over forty years old and white, he would not have any case. This demonstrates the weakness of his case.

impact on the size of his pension. (Appendix 5-6.)[2]

A review of the Seventh Circuit's unanimous Opinion here shows that it reviewed the testimony to see if it met this Court's requirements on burden of proof. The conclusion was that Christensen's proof did not meet the requirements. It found that Christensen's evidence did not support the jury's verdict and therefore set aside the judgment.

Pretext could have been proved in a number of ways. We cite the court to an Eleventh Circuit opinion, *Miles v. M. N. C. Corporation,* 750 F. 2d 867 (11th Cir., 1985), which gives some examples — comparative evidence, statistical evidence or direct evidence. In our case, there is no direct evidence. There is no comparative evidence or statistical evidence in favor of plaintiff. Petitioner's only evidence essentially shows that Equitable decided to transfer him to Chicago and fired him when he refused the transfer. The case should not have gone to the jury under the holdings of this Court, and having gone to the jury which found for plaintiff, the reversal of the verdict by the lower court was proper.

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2. The impact of Petitioner's early discharge on his pension is, without more, unavailing to prove age discrimination. *Miller v. General Electric Company,* 562 F. Supp. 610 (E.D. Pa. 1983).

II.

There is no conflict in the Circuits regarding review of decisions on motions for Judgment n.o.v.

Wright and Miller, *Federal Practice and Procedure,* at Section 2524, summarizes the criteria necessary for sending a case to the jury and for granting a Motion for Judgment n.o.v. The issue of whether evidence is sufficient to create a question of fact for the jury is solely one of law. The court must determine if there is evidence on which a jury could properly find a verdict for a party in whose favor it found. In so doing, the courts may not reweigh evidence, assess credibility or redetermine the facts. The court should view the evidence most favorably for the party opposing the motion and give that party the benefit of all inferences which may be drawn. The court must determine whether or not there is but one conclusion as to the verdict that reasonable people could reach.

The Seventh Circuit's most recent decisions regarding judgments n.o.v. are in accord with this summary, *Tice v. Lampert Yards, Inc.*, 761 F. 2d 1210 (7th Cir., 1985), cited by the Seventh Circuit in its opinion in our case.

There is no conflict between the Seventh Circuit and the other Circuits and Petitioner's cases demonstrate the lack of conflict.

Cazzolla v. Codman & Shurtleff, 751 F. 2d 53 (1st Cir., 1984), an age discrimination case, found that Judgment in favor of plaintiff was based on more than a mere possibility.

In *EEOC v. University of Oklahoma,* 774 F. 2d 999 (10th Cir., 1985), the court reviewed the record, noted evidence of pretext, and reversed a grant of Judgment n.o.v.

Coburn v. Pan American World Airways, 711 F. 2d 339 (D.C. Cir., 1983), *cert. denied*, 464 U.S. 994 (1983) was an age discrimination case where there was no evidence in the record that age was a determining factor. The court affirmed the Judgment n.o.v. in the trial court.

In *Hagelthorn v. Kennecott Corp.* 710 F. 2d 76 (2nd Cir., 1983), there was testimony that plaintiff was told he would be fired because of age; the court held there was sufficient evidence to send the case to the jury.

In *Lindsey v. American Cast Iron Pipe Company*, 772 F. 2d 799 (11th Cir., 1985), defendant told plaintiff that it would be looking for someone younger than he to fill a position. In light of this testimony, the court held there was sufficient evidence to send the case to the jury.

In *Bohrer v. Hanes Corp.*, 715 F. 2d 213 (5th Cir., 1983), an age discrimination case, Judgment n.o.v. was affirmed in view of management's complaints against plaintiff; here also the court applied the same standard as did the Seventh Circuit.

Lovelace v. Sherwin-Williams Co., 681 F. 2d 230 (4th Cir., 1982) was an age discrimination case where the trial court granted Judgment which was affirmed on appeal. The plaintiff here failed to show pretext. He merely denied that management's complaints were sound.

Jackson v. Shell Oil Co., 702 F. 2d 197 (9th Cir., 1983) was an age discrimination case wherein a request for Judgment n.o.v. was denied because of evidence of pretext.

Our view of Petitioner's cases shows that not only are they all consistent with each other and the Seventh Circuit, but that those courts would have reversed the Judgment in our case. In

each case where Judgment n.o.v. was affirmed, there was, as in our case, a lack of any evidence to support the verdict. In each case where a denial of Judgment n.o.v. was affirmed, or where a grant of Judgment n.o.v. was reversed, there was evidence (often direct) which was sufficient to support a jury verdict for plaintiff. In our case, there is no direct or circumstantial evidence to support the verdict that Equitable wanted to transfer Christensen to Chicago because he was white and over forty in order to replace him with a younger black male.

The fact that the Seventh Circuit reversed a jury verdict and reversed the court's decision denying the Motion for Judgment n.o.v. does not show any trend. What it shows is that the Seventh Circuit applied the standard which is being applied consistently and uniformly among the Circuits and found that Christensen failed to sustain his burden of proof.

The Seventh Circuit did not weigh the evidence in our case. It looked at the record, just as the other Circuits looked at their records, to determine if there was evidence sufficient to support the jury's verdict when viewed in the light most favorable to Christensen.

Petitioner claims at page 20 of his Petition that there is a "babel of standards of review" in the country, that the Courts of Appeal are enunciating different standards. His own cases demonstrate that Petitioner is incorrect. While there may be some semantic differences, the substance of the holdings in all Circuits is the same. There is no need for this Court to grant *certiorari*.

Lastly, Christensen cites *Anderson v. City of Bessemer City*, ____ U.S. ____(1985) in an attempt to draw some distinctions between the review in bench trials and jury trials. We submit that the standard of review of a Motion for Judgment n.o.v. is not

perceptibly different from the "clearly erroneous" standard of review in bench trials.

III.

Petitioner failed to show that the affirmative action program discriminated against him.

Christensen did not establish that the existence of the affirmative action program motivated Kist's action in replacing him with a younger black male. There was no proof that the affirmative action program required that he be eased out of his position in Indianapolis.

Petitioner did not prove that there was a trend by Equitable to ease out, terminate, or transfer white employees in order to make room for black employees pursuant to its affirmative action program. The only proof submitted was the existence of Equitable's affirmative action program. He offered no proof at all as to its actual implementation to the detriment of himself or other white employees. Under these circumstances, the affirmative action program, as noted by the Seventh Circuit, was not probative of intent to discriminate against Petitioner on account of race.

The Seventh Circuit concluded that there is nothing in this record to show a connection between the action taken and the affirmative action program and, therefore, the affirmative action program is not evidence of discriminatory intent. The Seventh Circuit further said that the mere existence of the program should not be used to penalize employers for attempting to rectify past discrimination.

CONCLUSION

The Petition for Certiorari should be denied because Petitioner failed to meet his burden of proof that his employer took certain action with the intent to discriminate against him on account of age and race. There is no issue here which warrants this Court's review.

Respectfully submitted,

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